Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Improving Competitive Broadband Access to Multiple Tenant Environments

Comments of AARP
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AARP’s interest in this proceeding
AARP respectfully submits these Comments for the FCC’s consideration, and thanks the Commission for the opportunity to participate in this important proceeding regarding the impact of the broadband access bottleneck controlled by landlords in multiple tenant environments (MTEs). AARP studies show that 15 percent of adults 50+ do not have access to any type of internet and 60 percent say the cost of high-speed internet is a problem. Telecommunications technology has promoted the ability of older Americans to age in place, and reliable and affordable telecommunications is a key element of providing aging in place solutions. AARP believes that all Americans, including those who reside in MTEs, should benefit from broadband competition.

The Commission should promote broadband competition in MTEs
The Public Notice requests comments on matters related to MTEs to update the record associated with the 2019 Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking (2019 Notice).¹ In general, the Public Notice requests information to refresh the record in light of “changes over the last two years” in the nature of agreements associated with revenue sharing, exclusive wiring, and exclusive marketing.² AARP notes that the nation has been in the grips of the COVID-19 pandemic during the majority of the two years since the reply comments were received in response to the 2019 Notice. The pandemic has likely introduced new challenges for both broadband providers and the owners of multiple tenant buildings, and AARP welcomes the opportunity to consider the insights provided by the parties in this record refresh, although based on a review of ex parte materials filed after the

2019 reply comments, AARP does not expect many surprises. The issues raised in the 2019 Notice were basic economic issues related to the potential for the exercise of market power on the part of multiple tenant building owner, who controls building-access bottlenecks for potential broadband customers. Incumbent broadband and video providers are the beneficiaries of the entry barriers associated with the current MTE environment. AARP believes that the same economic principles apply now as did pre-COVID, and that the MTE access bottleneck hurts competition.

For those MTEs which do limit competition for their tenants, the incumbent firms that have entered into exclusive agreements or payment arrangements benefit from the entry barrier enabled by the MTE owner. From the customer’s perspective it does not matter “which came first,” i.e., a building owner’s demand for exclusivity, or the broadband provider’s request for exclusivity, as the impact is reduced competitive choice in either case. As a result, AARP believes that the Commission should impose a pro-competitive framework for MTEs that will benefit broadband consumers who reside in MTEs.

The Commission is no stranger to issues of access to and within physical facilities in the pursuit of increasing competition. The Commission has previously addressed building access in the multichannel video programming distributor market (MVPD). In that proceeding the Commission concluded that “exclusivity clauses cause significant harm to competition and consumers . . . . We further find that although exclusivity clauses may in certain cases be

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3 See, for example, August 28, 2020 Letter to Marlene H. Dortch from INCOMPAS; October 9, 2020 Letter to Marlene Dortch from the National Multifamily Housing Council, National Apartment Association, and Institute of Real Estate Management; November 22, 2020 Letter to Marlene H. Dortch from Sonic; September 7, 2021 Letter to Marlene H. Dortch from NCTA.

4 See, for example, In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, November 13, 2007.
beneficial, at least in the short term, to consumers, the harms of exclusivity clauses outweigh their benefits.”\(^5\) Alternatively, when implementing the 1996 Telecommunications Act, a law which opened incumbent local exchange carrier (ILEC) facilities to competitive local exchange carriers (CLECs), the Commission crafted rules associated with enabling access to, and cost-based pricing for, colocation space.\(^6\) These previous Commission efforts suggest that the matters now being considered have similar economic characteristics to matters associated with building access of the past. AARP believes that the basic pro-competitive frameworks of the past continue to still be relevant today. In order to promote broadband competition in the MTE environment, the Commission should take steps to ensure the following outcomes:

1. MTE owners should be required to allow all broadband ISPs to offer service in their buildings. The Commission should establish qualifications for ISPs so as to enable a level playing field among all qualified providers for building access, such as for all ISPs that actively engage in Form 477 reporting.

2. MTE owners that request payments from broadband providers for offering service in their buildings should be required to proactively make their terms public and available to all broadband providers on a nondiscriminatory basis. MTE owners should also be required to make public cost justification for payments requested by MTE owners.

3. Exclusive agreements between MTE owners and broadband providers should be banned.

4. The FCC should provide a venue, such as a “Rocket Docket,” to address disputes between MTE owners and broadband ISPs.

**Open ISP access to MTEs**

To ensure that competitive ISPs have access to prospective customers residing in an MTE environment, the Commission should establish a database of qualified ISPs. Current Form 477 filers could serve as a foundation, with brand new entrants providing evidence of managerial, 

\(^5\) *Id.* ¶26.

financial, and technical capabilities to the Commission. The Commission should structure
building access rules to mirror the relevant portions of West Virginia’s building access rules for
MVPDs. Sample rules are provided below.

**MTE open access rules**

(a) A landlord may not:

(1) Interfere with the installation, maintenance, operation, or removal of broadband ISP and/or MVPD facilities upon their property or multiple dwelling premises, except that a landlord may require:

   (A) That the installation of broadband ISP and/or MVPD facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the multiple dwelling premises and the convenience and well-being of other tenants;

   (B) That the broadband ISP and/or MVPD or the tenant or a combination thereof bear the entire cost of the installation or removal of such facilities; and

   (C) That the broadband ISP and/or MVPD agrees to indemnify the landlord for any damage caused by the installation, operation, or removal of such facilities;

(2) Demand or accept any payment from any tenant, in any form, in exchange for permitting broadband ISP and/or MVPD service on or within their property or multiple dwelling premises, or from any broadband ISP and/or MVPD operator in exchange therefor except as may be determined to be just compensation in accordance with this article;

(3) Discriminate in rental charges, or otherwise, between tenants who receive broadband ISP and/or MVPD service and those who do not.

The Commission’s adoption and enforcement of these rules will remove bottlenecks imposed by MTE owners and remove competitive advantages enjoyed by incumbents. These rules also enable the recovery of legitimate costs in a manner where the entity that causes the costs pays the costs.

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Public disclosure of payments requested from broadband ISPs

Payments made from broadband ISPs to MTE owners may come in different forms, such as key charges or revenue sharing. In theory, revenue sharing agreements can serve the legitimate purpose of recovering building owner costs associated with providing access. However, as noted in the proposed rules, there must be a cost basis for any charges imposed by the MTE owner. It seems reasonable to expect that, when constructing a new residential multiple tenant building, any rational building owner would include wiring, or at least the conduit to enable the pulling of wiring, for the provision of telecommunications services to prospective tenants. In other words, the forces of competition in the MTE market require that the building owner make these investments, and as such, the building owner causes the costs and should be the one to pay the costs. It is difficult to imagine that any building constructed in the past 70 years would not have incorporated the availability of some type of telecommunications wiring or conduit to serve residents.

Of course, in very old buildings, or because of the introduction of new technology, there are likely to be incremental costs associated with wiring a building. For example, if new technology associated with a specific service provider is required for service delivery, (e.g., a building has existing coaxial cable and the service provider wants to deliver services over fiber) then those costs of the new technology deployment would be caused by the new service provider and should be borne by the service provider. Likewise, if additional costs arise due to the needs of a new competitive provider, those costs should be borne by that firm.

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8 Public Notice, p. 2. See also, Real Estate Association Comments, August 30, 2019, p. 2; INCOMPAS Comments, August 30, 2019, pp. 7-8.
It is clear from the 2019 comments that revenue sharing can be used to erect a strategic entry barrier that may prevent some broadband ISPs from serving specific buildings.⁹ To address the revenue sharing issue, the Commission should require the disclosure of revenue-sharing agreements. Data associated with disclosure could include, in addition to the monetary terms of the agreement, information on the nature of the MTEs (e.g., geographic location, number of units in a specific building under the revenue sharing, and number of units overall associated with the property owner or property management group that are subject to the revenue sharing agreement). Disclosure would identify market practices and enable the Commission and potential market entrants to identify practices that may not be cost based. Ultimately, the Commission will also need to have a mechanism in place that would enable the rapid evaluation of complaints brought by potential entrants. Public Knowledge, et al.’s suggestion of a “rocket docket” would make sense in this context.¹⁰

**Exclusive or exclusionary agreements should be prohibited**

It is basic economics that exclusivity clauses generate entry barriers.¹¹ For example, in a 2013 *Yale Law Journal* article Scott Hemphill and Tim Wu discuss exclusionary practices. Hemphill

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⁹ See, for example, Comments of INCOMPAS filed in this docket on August 30, 2019, p. 4; Starry Comments filed in this docket on August 30, 2019, p. 7; T-Mobile Comments filed in the docket on August 30, 2019, p. 4; Uniti Fiber Comments filed in this proceeding on August 30, 2019, p. 8; Verizon Comments filed in this docket on August 30, 2019, p. 4, noting that “the Commission should instead take a more targeted approach by prohibiting providers from entering into revenue sharing agreements (as we’ve defined them above) as a condition of access.”

¹⁰ Comments of Public Knowledge and New America’s Open Technology Institute, filed in this docket on August 30, 2019, p. 15.

and Wu note that “simple exclusion” may be achieved by a single firm, an experience with which this Commission has significant experience:

In the simplest story, the excluders act on their own, without enlisting assistance from other parties, to raise the costs of market entry. The excluders might manipulate a standard-setting process to exclude the rival, engineer product incompatibility, or game the regulatory system. Though the methods vary, their shared features are that the excluder does not need to contract with others to succeed and that the costs of exclusion are relatively low. In the monopoly context, a good example of simple exclusion is AT&T’s alleged effort in the 1970s to exclude MCI from long-distance service, including sabotaging MCI’s connections, punishing its own customers when they chose MCI services, and disparaging the quality and reliability of MCI’s products. AT&T accomplished the exclusion on its own and at relatively low cost.\(^\text{12}\)

Hemphill and Wu extend their discussion of exclusion to a variant that is relevant to the issues raised by the Public Notice, “parallel exclusion.” Parallel exclusion arises when firms enlist the help of others to block or slow would-be market entrants.\(^\text{13}\) Hemphill and Wu’s “parallel exclusion” meshes precisely with the issues raised in the Public Notice—i.e., incumbents utilizing agents (in this case MTE owners) to assist them with their exclusionary practices:

A second means of exclusion is for the excluder to recruit "agents" at a different point in the chain of production -- for example, a manufacturer’s downstream distributors -- to assist it in accomplishing the exclusion. Microsoft, for example, entered into exclusive contracts with the firms that preloaded software on computers in order to starve Netscape, its rival, of the most important means of distribution. Using such agents to weaken or exclude a competitor is one way to raise a rival's costs. . . .

Agent-driven schemes, unlike simple exclusion, can be expensive for the excluders. *This is because the agents lose the opportunity to deal with outsiders, who may offer an innovative product or lower prices.* Consider, for example, the distributor who typically wants to carry new or cheaper products. The agent, therefore, must either be paid off, threatened, or both, to make it cooperate with the scheme.\(^\text{14}\)

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\(^{14}\) Hemphill and Wu, *id.*, pp. 1201-1203, emphasis added.
Given the record in this proceeding, it is clear that exclusionary practices of the “parallel” nature may be employed by a variety of incumbent actors in markets across the nation.\textsuperscript{15} Incumbent providers have cultivated relationships with building owners that are mutually beneficial.\textsuperscript{16} Banning exclusionary behavior is reasonable. Exclusionary behavior that should be banned includes (1) exclusive revenue sharing agreements; (2) exclusive wiring arrangements, including sale-and-leaseback arrangements; and (3) exclusive marketing arrangements. Each of these three items contributes to an entry barrier. As noted by the Commission in 2007, in its assessment of exclusive agreements in the MPVD marketplace, the harms of exclusive agreements exceeded the benefits.

We conclude that the harms significantly outweigh the benefits in ways they did not at the time of the Commission’s 2003 Inside Wiring Order. Specifically, they bar new entry and competition for both MVPD services and the so-called “triple play” of voice, video, and broadband Internet access services. They also discourage the deployment of broadband facilities to American consumers. This, in turn, has the effect of significantly hindering or preventing new MVPDs from providing to MDU residents video programming services that are within the scope of Section 628(b). We therefore conclude that cable operators’ use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice proscribed by Section 628(b).\textsuperscript{17}

AARP believes that similar conclusions on exclusivity can be drawn regarding the issues raised in the Public Notice.

\textsuperscript{15} See, for example, Comments of INCOMPAS filed in this docket on August 30, 2019, \textit{passim}; Starry Comments filed in this docket on August 30, 2019; T-Mobile Comments filed in the docket on August 30, 2019, pp. 14-15; Uniti Fiber Comments filed in this proceeding on August 30, 2019, p. 3; Verizon Reply Comments filed in this proceeding on September 30, 2019, p. 11.

\textsuperscript{16} “Payments from incumbent providers to buildings are presented as a form of compensation to the building for the right to serve their residents. \textit{However, this ignores the fact that in many cases these fees are willingly offered by the incumbent provider, not requested by the building owner.}” Comments of Starry filed in this docket on August 30, 2021, p. 7.

\textsuperscript{17} In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, November 13, 2007.
Commission authority

The Public Notice raises the issue of Commission authority.\footnote{The Public Notice raises the issue of Commission Authority as the “final” record refresh request, devoting one sentence to the issue.} AARP believes that the issues raised in the Public Notice must be viewed in the light of the lack of a solid foundation for the Commission to fully address broadband access in multiple tenant environments. AARP is encouraged by the fact that the Commission has jurisdiction over broadband internet access services provided as part of a bundle offered by Multichannel Video Programming Distributors (MVPDs) through Section 628 of the Act.\footnote{See, 2019 Notice, at ¶32. See also, 47 U.S.C. §548.} It continues to be a reasonable assumption that if broadband is offered by a MPVD as part of a bundle, that the Commission continues to have the authority to prevent “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”\footnote{47 U.S.C. §548(b). This authority was upheld by the D.C. Circuit in National Cable & Telecommunications Association v. FCC, 567 F. 3d 659, 664 (DC Cir. 2009).}

However, due to the Commission’s unfortunate decision to reclassify broadband as an information service,\footnote{In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, January 4, 2018.} the Commission’s authority over broadband under Section 201, which was cited by a source of authority in the 2019 NPRM,\footnote{In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council, GN Docket No. 17-14, MB Docket No. 17-91, Notice of Proposed Rulemaking and Declaratory Ruling, July 12, 2019, ¶33.} no longer appears to be valid. As the D.C. Circuit noted in the Mozilla ruling, “by reclassifying broadband as an information service, the Commission placed broadband outside of its Title II jurisdiction” and “Title II provision has no
work to do here because the 2018 Order took broadband out of Title II.”23 Furthermore, the Commission has also hobbled its ability to address important matters associated with broadband competition by continuing to stand by the position that Section 706 of the Communications Act,24 which directs the Commission to “promote competition” and “remove barriers to infrastructure investment” for advanced telecommunications capability is hortatory.25 Here too, the Commission should reconsider this interpretation.

Certainly, while the ability of the Commission to address MPVD access issues through Section 628 is better than no authority at all, the Commission’s apparent inability to address access for broadband ISPs whose business model does not involve bundling video services with broadband undermines the Commission’s ability to promote competition for advanced telecommunications services, in contradiction to the language of Section 706 of the Act. Consumers continue to exhibit strong demand for over-the-top video services, with data showing that consumer use of streaming services now exceeds cable subscription, and a growing consumer appetite for over-the-top video.26 The Commission’s apparently limited ability to promote stand-alone broadband competition is most unfortunate given lingering bottlenecks, such as those associated with

MTEs. The Commission should use this opportunity to reverse the self-inflicted obstacles to promoting broadband competition and reclassify broadband as a telecommunications service.

Conclusion
AARP encourages the Commission to accelerate broadband deployment by improving the market competition in MTEs. The Commission should act to prohibit the use of anti-competitive exclusionary arrangements between MTE owners and MVPD or broadband ISPs. AARP encourages the Commission to take the following pro-competitive steps:

1. MTE owners should be required to allow all broadband ISPs to offer service in their buildings. The Commission should establish qualifications for ISPs so as to enable a level playing field among all qualified providers for building access, for example, all ISPs that actively engage in Form 477 reporting.

2. MTE owners that request payments from broadband providers for offering service in their buildings should be required to make their terms public and available to all broadband providers on a nondiscriminatory basis. MTE owners should also be required to make public cost justification for payments requested by MTE owners.

3. Exclusive agreements between MTE owners and broadband providers should be banned.

4. The FCC should provide a venue, such as a “Rocket Docket,” to address disputes between MTE owners and broadband ISPs.

Finally, while AARP believes that the Commission has sufficient legal authority under section 628, among others, AARP believes that the Commission should reclassify broadband service as a Title II telecommunications service. AARP also believes that the Commission should rescind its 2019 preemption of Article 52 of the San Francisco Police Code.27

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